SUPREME COURT, U. S.

MAY 23 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974, No. 74-1334

F. DONALD ZUCKER and
HARRY J. BARTON,
Petitioners

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA and THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINIONS BELOW

The opinion of the District Court (Green, J.) dated March 29, 1974, dismissing the complaint is reported at 373 F. Supp. 748 (E.D. Pa. 1974). The decision of the Court of Appeals affirming the District Court's order is reported at 510 F.2d 971 (3d Cir. 1975). The Judgment Order of the Court of Appeals (Maris, Hastie, and Gibbons, JJ.) is set forth as Appendix B to the Petition.

QUESTIONS PRESENTED

1. Did the district court correctly apply the Johnson Act, 28 U.S.C. § 1342, which deprives the federal district courts of jurisdiction to interfere with rates for intrastate telephone service, which had been approved by a state administrative agency?

2. Did the district court properly exercise its discretion in declining, under the doctrine of comity, to take jurisdiction, if any, of a state regulatory matter of local concern, involving intrastate telephone rates?

3. Did the conduct of Bell Telephone Company in charging the rate attacked in this suit constitute "state action" for purposes of the Civil Rights Act, 42 U.S.C. § 1983?

4. Should a federal court assume jurisdiction over a matter which is comprehensively regulated by the Pennsylvania Public Utility Commission where a plaintiff has bypassed that state agency?

STATEMENT OF THE CASE

On December 3, 1970, The Bell Telephone Company of Pennsylvania (hereinafter "Bell Telephone"), pursuant to § 308 of the Pennsylvania Public Utility Law (66 Pa. Stat. Ann. § 1148), filed with the Pennsylvania Public Utility Commission revisions of its tariffs governing its various local intrastate telephone rates. Subsequent to the filing, the Commission instituted a full-blown investigation of the matter upon its own motion and upon the complaints of customers which had been filed opposing the proposed increased rates.

The Commission proceeding (hereinafter "rate case") generated fifteen days of hearings (from April 6, 1971, to August 12, 1971), and resulted in 2,683 pages of testimony and 154 exhibits. Twenty formal complaints were filed by parties other than the PUC, of which seven were withdrawn prior to the hearings. On December 14, 1971, after this exhaustive investigation, the Commission issued a 96-page order, part of which is the subject of plaintiffs' challenge herein. In its order the Commission approved the rates proposed by Bell for certain services and said it would accept others if revised in a specified manner. The rate in question in this case, Bell's 50-cent-per-month charge for private number service, is of the latter variety, having originally been filed as a $1.00-per-month charge.

On the same date as its filing with the Commission—December 3, 1970—Bell sent to each of its subscribers notice of the proposed rate increases in the form of a first class mail letter from Bell's President, informing them that Bell was in the process of requesting the Commission to approve various increases and changes in its rates, and indicating that a copy of the proposed new rate schedules was available for inspection upon

request. (A. 8) This individual notice to each customer was in addition to Bell's filing of the revised tariff provisions with the Commission, with notice of the changes sought, and the posting of notice for public view at each of Bell's business offices calling attention to the new tariffs and their availability for examination. (A. 7-8) And it was in addition to the widespread publicity in the news media that attended Bell Telephone's rate filing. (A. 8-12)

The complaint herein alleges, among other things, that the Commission's order of December 14, 1971, accepting a 50-cent-per-month charge for private number service was made without adequate notice and hearing, thus depriving petitioners of due process of law in violation of the fourteenth amendment, and the federal civil rights statutes. Bell Telephone's conduct in charging the rate attacked here is alleged to be "state action" and thus subject to constitutional scrutiny.

Bell Telephone moved in the District Court to dismiss the complaint on four grounds: (1) that the Johnson Act, 28 U.S.C. § 1342, deprived the court of jurisdiction; (2) that under the doctrine of comity the federal court should decline a matter of such peculiar local concern; (3) that the subject matter of the complaint was already comprehensively regulated by a state administrative agency where a remedy was available; and (4) that in any event, Bell Telephone's alleged conduct is not "state action" and thus not subject to general constitutional proscriptions or to the Civil Rights Act, 42 U.S.C. § 1983. The District Court granted Bell Telephone's motion on two grounds: that it was deprived of jurisdiction by the Johnson Act, and that the doctrine of comity required it to decline to exercise its jurisdiction even if the Johnson Act were inapplicable. In a short *per curiam* opinion

the Court of Appeals (Maris, Hastie, Gibbons, JJ.) affirmed on the same grounds.

The courts below, therefore, did not reach, and thus left undecided, the third and fourth grounds of Bell Telephone's motion, namely, the lack of "state action," and the fact that the tariff in question was the subject of comprehensive regulation by a state administrative agency. It is undisputed, however, that the decisions below were correct if any one of the four grounds of Bell Telephone's motion to dismiss is sound.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS OF NO GREAT SIGNIFICANCE AND IS CLEARLY CORRECT.

The subject matter of this lawsuit is nothing more than routine regulation of rates by a state administrative agency. Dismissal of this suit by the district court was required on four independent grounds, each of which involves the straight-forward application of long settled principles of law.

The district court below disposed of the case by relying upon two of four possible grounds, namely, the Johnson Act (28 U.S.C. § 1342) and the doctrine of comity. The Court of Appeals (by Maris, Hastie, Gibbons, JJ.) affirmed easily in a short *per curiam* opinion. The courts below correctly decided that the Johnson Act deprives the federal courts of jurisdiction in this case, which involves an "order affecting rates chargeable by a public utility and made by a State administrative agency." Moreover, the doctrine of comity, independent of the Johnson Act, is ample authority for dismissal.

But even these compelling reasons in support of dismissal do not exhaust the grounds supporting the judgment below. This action is brought under the Civil Rights Act of 1871 (42 U.S.C. § 1983), which applies only to the conduct of a state, or to the acts of one acting "under color of state law." *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972). The conduct of Bell Telephone in charging the rate here under attack is clearly not "state action." Moreover, after the district court issued its opinion, this Court decided *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Any open question on the "state action" issue was surely put to rest by that opinion.

Finally, the fact that petitioners have available remedies before the Pennsylvania Public Utility Commission under the comprehensive jurisdiction it exercises over the subject matter of this dispute is still a further reason for declining the petition. See, *e.g.*, *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).

Each of these points will be dealt with briefly.

II.

THE JOHNSON ACT (28 U.S.C. § 1342) DEPRIVED THE DISTRICT COURT OF JURISDICTION IN THIS CASE.

Under the Johnson Act (now 28 U.S.C. § 1342)[1] the federal courts have steadfastly refused to interfere in the state rate-making process. See, *e.g.*, *Tennyson* v. *Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974); *DeKalb County* v. *Southern Bell Tel. & Tel. Co.*, 358 F. Supp. 498 (S.D. Ga. 1972), *aff'd per curiam*, 487 F.2d 700 (5th Cir. 1973); *Diggs* v. *Pennsylvania Public Utility Comm'n*, 180 F.2d 623 (3d Cir. 1950).

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[1] The Johnson Act (28 U.S.C. § 1342) provides:

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State."

Argument

In their petition for certiorari, petitioners concede the applicability of all the provisions of the Johnson Act, except subsection (3), which they contend was not satisfied because the Pennsylvania Public Utility Commission's order approving the rate at issue here was not made "after reasonable notice and hearing." (Petition for Writ of Certiorari, p. 11) This argument is without merit and was flatly rejected by the District Court after a complete factual analysis of the many forms of notice that were given to the public by Bell Telephone. (A. 6-12) The District Court found specifically that the notice was in "full compliance" (A. 10) with the Pennsylvania Public Utility Law and the Commission's Regulations, and the petitioners themselves have conceded that the notice was in conformity with the Commission's rules and regulations.[2] (Petition for Writ of Certiorari, p. 6; Appellants' Brief in the Third Circuit, p. 4)

Petitioners rely only upon the most broad and general statements of policy contained in the leading decisions of this Court on notice—*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken* v. *Meyer*, 311 U.S. 457 (1940). Each of these decisions involved the notice required in judicial adjudicative proceedings, and plaintiffs have failed to cite a single case that stands for the proposition that that kind of notice is required in a rate-making proceeding involving over 3 million customers. All of the conditions of the Johnson Act have been met and this action was properly dismissed.

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[2] This alone is sufficient basis on which to find "reasonable notice and hearing" within the meaning of the Johnson Act. As the Tenth Circuit said in *Tennyson* v. *Gas Service Co.*, *supra*:

> "The Johnson Act does not engraft its own undefined standards of notice and hearing upon the rate making bodies of the several states but requires no more than that which is appropriate to an 'order affecting rates.'" (506 F. 2d at 1141).

III.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO DISMISS THE COMPLAINT UNDER THE DOCTRINE OF COMITY.

The doctrine of comity is a means by which the federal judiciary accommodates the interests of the state in matters which are of peculiar local concern, and is well established in the federal courts. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

In *Alabama Public Service Comm'n* v. *Southern Railway Co.*, 341 U.S. 341 (1951), for example, this Court, although it found the Johnson Act inapplicable because the order attacked was not a rate order (341 U.S. at 350), upheld dismissal of the action on the basis of comity. The Court's opinion made short work of the argument that the federal courts are better equipped than state courts to protect constitutional rights (341 U.S. at 348-50), and concluded that, in view of the strong underlying principle of avoiding "needless friction with state policies," the plaintiff's rights should be "pursued through the state courts." (341 U.S. at 350).

The District Court here properly exercised its discretion. It acted well within the limits of the doctrine of comity, as developed by this Court and consistently followed by the lower federal courts. See, *e.g.*, *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Comm'n*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); *Kansas-Nebraska Natural Gas Co.* v. *City of St. Edward*, 234 F.2d 436 (8th Cir. 1956).

Petitioners' confusion of the abstention doctrine embodied in *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), with the doctrine of comity is evident in their petition (p. 12). This is not a case where a point

of state law is in doubt and the federal court is asked to postpone disposition of the case before it until the state courts have resolved the question. See *Gibson* v. *Berryhill*, 411 U.S. 564, 574, 580 (1973). Petitioners fail to distinguish between that doctrine and the doctrine of comity, which requires the federal courts to stay out of matters of strong local concern entirely, and has nothing to do with doubtful points of state law.

IV.

BELL TELEPHONE'S CHARGING THE RATE ATTACKED IN THIS ACTION IS NOT "STATE ACTION".

Petitioners claim that Bell Telephone violated the fourteenth amendment of the Constitution and the "Civil Rights Acts." However, constitutional provisions and the civil rights statutes require "state action," and Bell's conduct here does not amount to that.

In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974)—decided after the district court's opinion here—this Court rejected the notion sought to be revived by petitioners that because public utilities have monopolies, or are highly regulated by the states, or receive state approval for many of their practices, their conduct is "state action." In *Jackson*, as here, plaintiff argued that the utility's conduct was "state action" and therefore subject to the restrictions of the constitution and the Civil Rights Act (42 U.S.C. § 1983). This Court disagreed:

> "The nature of governmental regulation of private utilities is such that a utility may frequently be required by that state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility com-

> mission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." (419 U.S. at 357; footnotes omitted)

The *Jackson* decision is a complete bar to this action, for the conduct of Bell Telephone is charging the 50-cent-per-month rate for private number service is conduct of a private company only and is not subject to constitutional proscriptions.

V.

A FEDERAL COURT SHOULD NOT EXERCISE JURISDICTION OVER PUBLIC UTILITY TARIFFS COMPREHENSIVELY REGULATED BY A STATE ADMINISTRATIVE AGENCY.

Pennsylvania courts have long recognized that the regulation of intrastate telephone service, including the determination of the reasonableness of tariffs and utilities' practices thereunder, is within the exclusive jurisdiction of the Pennsylvania Public Utility Commission. See, *e.g.*, *Behrend* v. *The Bell Telephone Company of Pennsylvania*, 431 Pa. 63, 243 A.2d 347 (1968).

The Pennsylvania Public Utility Law (66 Pa. Stat. Ann. §1101, *et seq.*) creates a comprehensive scheme for the regulation of intrastate telephone service. The rate order attacked here was issued by the PUC after a lengthy rate proceeding, inquiring into the question of the fairness and reasonableness of the rates. This determination drew

heavily upon the expertise of the PUC in telephone utility regulation. Each rate in the tariff is inter-related to every other rate and to the fairness of the return which the utility is afforded the opportunity to earn on its property by the rates collectively. Consequently, if a federal court were to overturn a part of the tariff by declaring the 50-cent charge for private number service to be unlawful, this would not only deprive Bell of a significant amount of revenue, which the PUC found necessary in order to provide Bell a fair rteurn on investment, but would upset Bell's rate structure, and the Commission's delicate regulatory scheme.

The fact that the action of a public utility may raise issues of constitutional law has never been considered a reason for bypassing administrative agency jurisdiction. Administrative agencies, of course, frequently pass on evidentiary, procedural and substantive issues which have constitutional dimension, and their jurisdiction has not been held to depend on the existence or non-existence of such issues.

In the federal context, as well, challenges to a tariff, or its application, are consistently referred to the appropriate regulatory agency, at least for initial determination. See, *e.g.*, *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966); *Nader* v. *Allegheny Airlines, Inc.*, 43 U.S.L.W. 2457 (D.C. Cir., May 2, 1975).

In sum, the relief sought by petitioners would involve an unwarranted intrusion by a court into an area of administrative agency jurisdiction,[1] and this is a further reason why the petition for certiorari should be denied.

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[1] It is beyond challenge that the Pennsylvania Public Utility Commission has full power to effect the relief sought here. See *Diggs* v. *Pennsylvania Public Utility Comm'n*, 180 F.2d 623 (3d Cir. 1950.)

CONCLUSION

For the foregoing reasons, the writ of certiorari should not be issued.

Respectfully submitted,

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